4.10 EXCESSIVE USE OF FORCE - ARREST OR OTHER SEIZURE OF PERSON - BEFORE CONFINEMENT - FOURTH AMENDMENT

Your verdict must be for plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [here describe an act such as "struck, hit, or kicked"][4] plaintiff in the act of [arresting or stopping][5] plaintiff, and

Second, the use of such force was excessive because it was not reasonably necessary to [here describe the purpose for which force was used such as "arrest plaintiff," or "take plaintiff into custody," or "stop plaintiff for investigation"], and

Third, as a direct result, plaintiff was damaged,[6] and

[*Fourth*, defendant was acting under color of state law.][7]

In determining whether such force, [if any][8] was "not reasonably necessary," you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of 20/20 hindsight, would have used such force under similar circumstances. [The jury must consider that police officers are often forced to make judgments about the amount of force that is necessary in circumstances that are tense, uncertain and rapidly evolving.][9] [The jury must consider whether the officer's actions are reasonable in the light of the facts and circumstances confronting the officer, without regard to the officer's own state of mind, intention or motivation.][10]

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, then your verdict must be for defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if plaintiff has more than one claim against this defendant.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. The conduct indicated by plaintiff's evidence should be described generally.

5. Here describe the nature of the seizure of plaintiff in which defendant was engaged.

For the standards for determining whether a seizure under the Fourth Amendment was made or claimed, *see California v. Hodari D.*, 499 U.S. 621 (1991); *Cole v. Bone*, 993 F.2d 1328, 1332-33 (8th Cir. 1993).

6. A finding that plaintiff suffered some actual injury or damage is necessary before an award of substantial compensatory damages may be made under 42 U.S.C. § 1983. *Cunningham v. City of Overland*, 804 F.2d 1066, 1069-70 (8th Cir. 1986). Specific language which describes the damage plaintiff suffered may be included here and in the damage instruction. Model Instruction 4.50A, *infra*.

A nominal damages instruction may have to be submitted under *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). *See infra* Model Instruction 4.50B.

7. Use this paragraph only if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

8. Include this phrase if defendant denies the use of any force.

9. Add this phrase if appropriate. *See Graham v. Connor*, 490 U.S. 386 (1989). It should not be used if repetitious. *See Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002).

10. Add this phrase if justified by the evidence. *See Graham v. Connor*, 490 U.S. 386 (1989).

Committee Comments

This instruction should only be used in connection with claims by *unconvicted* persons that excessive force was used to arrest them, stop them for investigation, or otherwise seize them. In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court rejected substantive due process standards which had long been applied in cases involving claims by *unconvicted persons* of excessive force by public officers. Rather, the Court held that a "reasonableness" standard, derived from the Fourth Amendment, applied in cases involving the use of force in making an arrest or an investigatory stop. *Id.* at 393-94. *See also Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). Thus, in cases involving claimed excessive use of force in the seizure of unconvicted persons, the trial judge cannot rely upon the pre-*Graham* body of law which applied substantive due process standards under *Bauer v. Norris*, 713 F.2d 408 (8th Cir. 1983). This instruction does not cover cases involving injuries to persons other than to the suspect. For the elements for such a case, *see Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (en banc).

Jackson v. Crews, 873 F.2d 1105 (8th Cir. 1989) specifically recognized that the "shock the conscience" standard is not appropriate in arrest cases. The case reaffirmed that the four factors set forth in *Davis v. Forrest*, 768 F.2d 257 (8th Cir. 1985) are sufficient in the jury instruction, and that it would not be appropriate to require an additional finding that the defendant's conduct "shocks the conscience" before a constitutional violation is found.

Once an unconvicted person becomes a pretrial detainee, the use of force is measured by

a substantive due process standard of the Fifth and Fourteenth Amendments. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). *See generally*, Model Instruction 4.20, *infra*, for use of excessive force claims of pretrial detainees. The Eighth Circuit has not decided when the person's status changes from "arrestee" to "pretrial detainee." Most circuits that have addressed the issue found that the person becomes a pretrial detainee after the time of the first appearance before a judicial officer. *See Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989); *Hammer v. Gross*, 884 F.2d 1200, 1204 (9th Cir. 1989), *vacated en banc on other grounds*, 932 F.2d 842, 845 n.1 (9th Cir. 1991) (noting agreement with Fourth Amendment standard), *cert. denied*, 502 U.S. 980 (1991); *Austin v. Hamilton*, 945 F.2d 1155, 1159-60, 1162 (10th Cir. 1991), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995); *Pride v. Does*, 997 F.2d 712, 716 (10th Cir. 1993). These cases are discussed and collected in *Pyka v. Village of Orland Park*, 906 F. Supp. 1196, 1220 (N.D. Ill. 1995). The prevailing view appears to be that the use of force by the arresting officer, after the individual is taken into custody, but prior to the first appearance before a neutral judicial officer, is to be decided under Fourth Amendment standards. The individual's status as a pretrial detainee continues until the individual has been sentenced. *Williams-El v. Johnson*, 872 F.2d 224, 228-29 (8th Cir. 1989) (a person convicted, not yet sentenced, is still a pretrial detainee).

Any injury can be sufficient to warrant an award of damages. *See Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988); *Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir.), *cert. denied*, 493 U.S. 993 (1989). The jury should be instructed on nominal damages when appropriate. *See infra* Model Instruction 4.50B.

5.42 HARASSMENT (By Supervisor With No Tangible Employment Action) Essential Elements

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of [sex/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex/gender) (race) (color) (national origin) (religion) (age) (disability)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)].

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, [or if defendant is entitled to a verdict under Instruction ____,][7] your verdict must be for the defendant and you need not proceed further in considering this claim.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as “etc.” should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term “unwelcome” may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: “Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive.” This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be “based on sex” or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a “raunchy workplace”--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the “objective test” for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a “reasonable person.” In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. Because this instruction is designed for cases in which no tangible employment action is taken, the defendant may defend against liability or damages by proving an affirmative defense “of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities.” *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270). The bracketed language should be used when the defendant is submitting the affirmative defense. *See infra* Model Instruction 5.42(A).

Committee Comments

This instruction is designed for use in harassment cases where the plaintiff did not suffer any “tangible” employment action such as discharge or demotion, but rather suffered “intangible” harm flowing from a supervisor's harassment that is “sufficiently severe or pervasive to create a hostile work environment.” *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742,751 (1998).

It is impossible to compile an exhaustive list of the types of conduct that may give rise to

a hostile environment harassment claim under Title VII and other statutes. Some examples of this kind of conduct include: verbal abuse of a sexual, racial or religious nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; or age; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994); *Hukkanen v. International Union of Operating Eng'rs Local No. 101*, 3 F.3d 281 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559 (8th Cir. 1992); *Jones v. Wesco Invs., Inc.*, 846 F.2d 1154 (8th Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

Conduct Based on Sex or Gender

In general, in a sex discrimination case, the plaintiff must establish that the alleged offensive conduct was "based on sex." *Burns II*, 989 F.2d at 964. Despite its apparent simplicity, this requirement raises a host of interesting issues. For example, in an historically male-dominated work environment, it may be commonplace to have sexually suggestive calendars on display and provocative banter among the male employees. While the continuation of this conduct may not be directed at a new female employee, it nevertheless may be actionable on the theory that sexual behavior at work raises an inference of discrimination against women. *See Burns I*, 955 F.2d at 564; *see also Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994) (sexual conduct directed by male employees toward women other than the plaintiff was considered part of a hostile work environment).

The Eighth Circuit also has indicated that conduct which is not sexual in nature but is directed at a woman because of her gender can form the basis of a hostile environment claim. *See, e.g., Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171 (8th Cir. 1996) (jury instruction need not require a finding that acts were explicitly sexual in nature); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (calling a female employee "herpes" and urinating in her gas tank, although not conduct of an explicit sexual nature, was properly considered in determining if a hostile work environment existed); *see also Stacks*, 27 F.3d at 1326 (differential treatment based on gender in connection with disciplinary action supported a female employee's hostile work environment claim); *Shope v. Board of Sup'rs*, 14 F.3d 596 (table), 1993 WL 525598 (4th Cir. Dec. 20, 1993) (rude, disparaging, and "almost physically abusive" conduct based on gender supported a hostile environment claim).

The Eighth Circuit has not directly addressed the issue of whether vulgar or abusive conduct that is directed equally toward men and women can constitute a violation of Title VII. Because sexual harassment is a variety of sex discrimination, some courts have suggested that it is not a violation of Title VII if a manager is equally abusive to male and female employees. For example, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *abrogated on other grounds*, 510 U.S. 178 (1993), the court suggested that sexual harassment of all employees by a bisexual supervisor would not violate Title VII. In

a similar vein, the district court in *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1993), granted the employer's motion for summary judgment on the theory that the offending supervisor was abusive toward all employees. Although the Eighth Circuit reversed because the plaintiff had offered evidence that the abuse directed toward female employees was more frequent and more severe than the abuse directed at male employees, *Kopp* suggests that the "equal opportunity harassment" defense can present a question of fact for the jury. *But see Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993) (holding that "equal opportunity harassment" of employees of both genders can violate Title VII).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996). *See Pedroza v. Cintas Corporation No. 2*, 397 F.3d 1063 (8th Cir. 2005), for a discussion of the possible evidentiary routes for proving sexual harassment in same-sex cases.

Hostile or Abusive Environment

In order for hostile environment harassment to be actionable, it must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); *accord Parton v. GTE North, Inc.*, 971 F.2d 150, 154 (8th Cir. 1992); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 564 (8th Cir. 1992); *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989); *Minteer v. Auger*, 844 F.2d 569 (8th Cir. 1988). In *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986), the court explained:

> The harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d at 904. The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and nontrivial.

Id. at 749-50; *see Faragher*, 524 U.S. at 788 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"). *Compare Henthorn v. Capitol Communications, Inc.*, No. 03-1018 (8th Cir. Mar. 5, 2004) *and Duncan v. General Motors Co.*, 300 F.3d 928, 933 (8th Cir. 2002) *with Eich v. Board of Regents for Central Missouri State University*, 850 F.3d 752 (8th Cir. 2004).

"[I]n assessing the hostility of an environment, a court must look to the totality of the circumstances." *Stacks*, 27 F.3d at 1327 (citation omitted). In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), the Court held that a hostile environment claim may be actionable without a showing that the plaintiff suffered psychological injury. In determining whether an environment is hostile or abusive, the relevant factors include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. *See also Faragher*, 524 U.S. at ___, 118 S. Ct. at 2283 (reiterating relevant factors set forth

in *Harris*); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998) (citing *Harris*).

These same factors have generally been required in all types of harassment/hostile environment cases. *See supra* the cases cited in section 5.40.

Objective and Subjective Requirement

In *Harris,* the Supreme Court explained that "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")); *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Unlike those cases in which the plaintiff suffers a tangible employment action, however, in cases where no tangible employment action has been taken by the supervisor, the employer may raise an affirmative defense to liability or damages. *Id*. *See infra* Model Instruction 5.42A and Committee Comments.

5.80 FAMILY AND MEDICAL LEAVE ACT (FMLA) (29 U.S.C. §§ 2601 - 2654)
Introduction

These instructions are for use with cases brought under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 - 2654. The purposes of the FMLA are to balance the demands on the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. 29 U.S.C. § 2601(b). The Act entitles eligible employees to take up to 12 workweeks of unpaid leave because of a serious health condition that makes the employee unable to perform the functions of his or her position; because of the birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; or to care for the employee's spouse, son, daughter, or parent who has a serious health condition. 29 U.S.C. § 2612, 29 C.F.R. § 825.112.

Employers Covered by the FMLA

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R. § 825.104(d); *Beal v. Rubbermaid Commercial Products, Inc*., 972 F. Supp. 1216, 1222 n.13 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998). The Eighth Circuit has also held that public officials in their individual capacities are "employers" under the FMLA. *Darby v. Bratch*, 287 F.3d 673, 680-81 (8th Cir. 2002). In addition, the Supreme Court has held that states are employers under the FMLA. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Employees Eligible for Leave

Not all employees are entitled to leave under FMLA. Before an employee can take leave to care for himself or herself, or a family member, the following eligibility requirements must be met: he or she must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the previous 12-month period. 29 U.S.C. § 2611(2)(A). A husband and wife who are both eligible for FMLA leave and are employed by the same covered employer may be limited by the employer to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for 1) the birth of the employee's son or daughter or to care for that newborn; 2) for placement of a son or daughter for adoption or foster care, or to care for the child after placement; or 3) or to care for the employee's parent. 29 C.F.R. § 825.202(a).

Family Members Contemplated by the FMLA

Employees are also eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. Spouse means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. § 825.113.

Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age

18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.113(c). Persons with "*in loco parentis*" status under the FMLA include those who ~~had~~ have day-to-day responsibility to care for and financially support ~~the employee when the employee was~~ a child. 29 C.F.R. § 825.113(c)(3).

Parent means a biological parent of an employee or an individual who ~~stands or~~ stood *in loco parentis* to an employee when the employee was a ~~son or daughter~~child. 29 U.S.C. § 2611(7). The term "parent" does not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the *in loco parentis* definition. *Krohn v. Forsting*, 11 F. Supp.2d 1082, 1091 (E.D. Mo. 1998); 29 C.F.R. § 825.113(b).

"Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.113(c)(1).

"Activities of daily living" include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. *Id.* "Instrumental activities of daily living" include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. *Id.* "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.113(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. *Id.*

Leave for Birth, Adoption or Foster Care

The FMLA permits an employee to take leave for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100.

The right to take leave under the FMLA applies equally to male and female employees. A father as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child. 29 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her unable to work. In addition, if an absence from work is required for the placement for adoption or foster care to proceed, the employee is entitled to FMLA leave. 29 C.F.R. § 825.112(c)-(d).

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement unless state law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. § 825.201. Any such FMLA leave must be concluded during this one-year period. *Id.* An employee is not required to designate whether the leave the employee is taking is FMLA leave or leave under state law. 29 C.F.R. § 825.701. If an employee's leave qualifies for FMLA and state-law leave, the leave used counts against the employee's entitlement under both laws. *Id.*

Family and Medical Leave Act

What Constitutes a "Serious Health Condition?"

One of the more frequently litigated aspects of the FMLA is the issue of what type of condition constitutes a "serious health condition" under the Act. The concept of "serious health condition" was meant to be construed broadly, so that the FMLA's provisions are interpreted to effect the Act's remedial purpose. *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). The phrase is defined in the regulations as an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments. 29 C.F.R. § 825.114(a).

Specifically, inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care. 29 C.F.R. § 825.114(a)(1).

Incapacity plus treatment means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves: 1) treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider; or 2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. § 825.114(a)(2)(i). In some circumstances, the regulatory definition of incapacity offers limited guidance. *See, e.g., Caldwell v. Holland of Texas*, 208 F.3d 671, 675 (8th Cir. 2000) (in situation where three-year-old child did not work or attend school, the FMLA regulations offered insufficient guidance for determining whether child was incapacitated and fact finder must determinate whether the child's illness demonstrably affected his normal activity).

Note that under the FMLA, a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show the employee is incapacitated even if that job is the only one the employee is unable to perform. *Stekloff*, 218 F.3d at 861. This standard is less stringent than under the ADA in which a plaintiff must show that he or she is unable to work in a broad range of jobs to show that he or she is unable to perform the major life activity of working. *Id.*

Pregnancy or prenatal care includes any period of incapacity due to the pregnancy or prenatal care, such as time off from work for doctors' visits. 29 C.F.R. § 825.114(a)(2)(ii).

A chronic health condition means a condition which requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider, which continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to

work, attend school or perform other regular daily activities) rather than continuing incapacity. 29 C.F.R. § 825.114(a)(2)(iii).

Long-term incapacitating conditions are those for which treatment may not be effective, but require continuing supervision of a health care provider, even though the patient may not be receiving active treatment. 29 C.F.R. § 825.114(a)(2)(iv).

Conditions requiring multiple treatments includes any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment. 29 C.F.R. § 825.114(a)(2)(v).

The FMLA regulations provide some guidance concerning what is and is not a serious health condition. For example, the following generally do not fall within the definition of a serious health condition: routine physical, eye or dental examinations; treatments for acne or plastic surgery; common ailments such as a cold or the flu, ear aches, upset stomach, minor ulcers, headaches (other than migraines); and treatment for routine dental or orthodontic problems or periodontal disease. 29 C.F.R. § 825.114(b),(c). While the above conditions are not generally considered "serious," the Eighth Circuit has held that some conditions, such as upset stomach or a minor ulcer, could still be "serious health conditions" if they meet the regulatory criteria, for example, an incapacity of more than three consecutive calendar days that also involved qualifying treatment. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379 (8th Cir.), *aff'd*, 205 F.3d 370 (8th Cir. 2000).

In addition, the regulations provide guidance regarding what conditions commonly are considered serious health conditions. For example, chronic conditions could include asthma, diabetes or epilepsy; long-term incapacitating conditions could include Alzheimer's, a severe stroke or the terminal stages of a disease; and conditions requiring multiple treatments could include cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 29 C.F.R. § 825.114(a).

Courts in the Eighth Circuit have provided additional guidance regarding what constitutes a serious health condition. In *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998) the court analyzed several conditions against the regulatory definition. The court found that a minor back ailment, eczema, and non-incapacitating bronchitis were not serious health conditions under the FMLA. *Id.* at 1223-25. The court also held that an employee was not entitled to FMLA leave subsequent to her son's death noting "[l]eave is not meant to be used for bereavement because a deceased person has no basic medical, nutritional, or psychological needs which need to be cared for." *Id.* at 1216.

In addition, the Eighth Circuit has held that exams and evaluations given to an employee's child to determine whether the child had been sexually molested did not amount to treatment for a serious health condition covered by the FMLA. *Martyszenko v. Safeway, Inc*., 120 F.3d 120, 123-24 (8th Cir. 1997). The alleged molestation did not create a mental condition that hindered the child's ability to participate in any activity at all and did not restrict any of the child's daily activities. *Id.*

The regulations also provide that the phrase "continuing treatment" as used in the definition of serious health condition, includes a course of prescription medication and therapy, but not over-the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.114(b).

The Relationship Between the Fair Labor Standards Act (FLSA), Civil Rights Legislation, and the FMLA

Although earlier cases suggested the FMLA was more akin to the FLSA than to Civil Rights legislation, *see, e.g., Morris v. VCW, Inc*., 1996 WL 740544 (W.D. Mo. 1996), the Supreme Court has left no doubt that the FMLA is an anti-discrimination statute. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003) (holding "the FMLA aims to protect the right to be free from gender-based discrimination in the workplace and such a statutory scheme is subject to heightened scrutiny"). However, the FLSA can provide guidance for the interpretation of FMLA terms such as using FLSA "hours of service" to calculate FMLA eligibility for leave and determination of whether a supervisor is an "employer" for FMLA purposes. *See Morris* at *2 and cases cited therein.

Under the FLSA, the phrases "motivating factor" or "immediate cause" are used to determine whether an employer violated the anti-retaliation provision of the FLSA. These phrases have been interpreted to be the equivalent of a "but for" analysis, that is, discharge is unlawful only if it would not have occurred but for the retaliatory intent, even if it was not the sole reason for the employers' action. *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); *Reich v. Davis*, 50 F.3d 962, 965 (11th Cir. 1995)." *See E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 555 n.3 (8th Cir. 1998) (plaintiff must prove retaliation was the determining factor, not that it was the only factor).

However, in retaliation cases under the FMLA, courts frequently borrow the framework and method of analysis in civil rights cases. *See, e.g., Spurlock v. Peter Bilt Motors Co., Inc.*, 2003 WL 463491 (6th Cir. (Tenn.)); *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1282-83 (11th Cir. 1999); *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 319 (5th Cir. 1999); *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999); *Hodgens v. Dynamics*, 144 F.3d 151 (1st Cir. 1998); *Lottinger v. Shell Co.*, 143 F. Supp. 2d 743 (S.D. Tx. 2001); *Maxwell v. GTE Wireless Service Corp.*, 121 F. Supp. 2d 649, 658 (N.D. Ohio 2000); *Bond v. Sterling, Inc.*, 77 F. Supp. 2d 300, 302 (N.D.N.Y. 1999); *Belgrave v. City of New York*, 1999 WL 692034 at *42 n.38, aff'd, 216 F.3d 1071 (2000); *Stubl v. T.A. Systems*, 948 F. Supp. 1075, 1091 (E.D. Mich. 1997); *Peters v. Community Action CTE, Inc. of Chem. Chambers-Tallapoosa-Coosa*, 977 F. Supp. 1428 (M.D. Alabama 1997). Those cases generally used "motivating factor" where there was direct evidence of discrimination and "determining factor" when there was no direct

evidence of discrimination; however, after *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), such a distinction is probably no longer appropriate..

A review of the case law suggests that courts look to the FLSA and cases decided thereunder for the definition and scope of "employment-type" terms and concepts in the FMLA. However, the method of analysis for violations of the anti-discrimination provisions of the FMLA suggests looking to civil rights cases. *See Hibbs*, 538 U.S. at 728-30. The Eighth Circuit has not ~~clearly~~ resolved this issue. It is also not resolved at this time whether *Desert Palace v. Costa*'s requirement of a motivating factor test for all Title VII cases will carry over to other civil rights cases, including the FMLA. The law in this area is not clear. Therefore, if the term "motivating factor" is used, the "same decision" instruction, 5.82, should be given. If the term "determining factor" is used, the "same decision" instruction, 5.82, should not be given.

Nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability (*e.g.*, Title VII, the Pregnancy Discrimination Act, the Rehabilitation Act, the ADA, etc.). 29 U.S.C. § 2651(a)(b); 29 C.F.R. § 825.702(a).

Family and Medical Leave Act

5.81A FMLA - WRONGFUL TERMINATION - ELEMENTS (Employee with a Serious Health Condition)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][2] of the evidence:

[*First*, plaintiff was eligible for leave[3]; and]

First, plaintiff had a serious health condition (as defined in Instruction _____)[4]; and

Second, plaintiff was [absent from work][5] because of that serious health condition; and

[*Third*, plaintiff gave defendant appropriate notice of [his/her] need to be [absent from work][5];] [6] and

Fourth, defendant [describe employment action taken, e.g., discharged][7] plaintiff; and

Fifth, plaintiff's [absence from work][5] was a [(motivating) (determining)][8] factor in defendant's decision to [describe employment action taken, e.g., discharge][7] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)] [9].

[You may find that plaintiff's [absence from work] was a determining factor in defendant's (decision)[10] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [11]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. This element is bracketed because "appropriate notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

7. Insert ~~the~~ language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

8. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

9. This language should be used when the defendant is submitting an affirmative defense.

10. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

11. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Family and Medical Leave Act

5.81B FMLA - WRONGFUL TERMINATION - ELEMENTS (Employee Needed to Care for Spouse, Parent, Son or Daughter with a Serious Health Condition[1])

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

First, plaintiff's [identify family member] had a serious health condition (as defined in Instruction _____)[5]; and

Second, plaintiff was needed to care for [identify family member]; and

Third, plaintiff was [absent from work][6] to care for [identify family member]; and

[*Fourth*, plaintiff gave defendant appropriate notice of [his/her] need to be [absent from work][6];] [7] and

Fifth, defendant [describe employment action taken, e.g., discharged][8] plaintiff; and

Sixth, plaintiff's [absence from work][6] was a [(motivating) (determining)][9] factor in defendant's decision to [describe employment action taken, e.g., discharge][8] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)][10].

[You may find that plaintiff's [absence from work] was a determining factor in defendant's (decision)[11] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [12]

Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Model Instruction 5.81C, *infra*, should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

7. This element is bracketed because "appropriate notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

8. Insert the language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

9. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

10. This language should be used when the defendant is submitting an affirmative defense.

11. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious

health condition. The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Family and Medical Leave Act

5.81C FMLA - WRONGFUL TERMINATION - ELEMENTS (Employee Leave for Birth, Adoption or Foster Care)[1]

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

First, plaintiff was [absent from work][5] because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][6]; and

[*Second*, plaintiff gave defendant appropriate notice (as defined in Instruction _____)[7] of [his/her] need to be [absent from work][5];] [8] and

Third, defendant [describe employment action taken, e.g., discharged][9] plaintiff; and

Fourth, plaintiff's [absence from work][5] was a [(motivating) (determining)][10] factor in defendant's decision to [describe employment action taken, e.g., discharge][9] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction ____)][11].

[You may find that plaintiff's [absence from work] was a determining factor in defendant's (decision)[12] if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [13]

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Model Instruction 5.81B, *supra*, should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from Model Instruction 5.81B, *supra*, in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. Insert the language that corresponds to the facts of the case.

7. Insert the number of the Instruction defining "appropriate notice."

8. This element is bracketed because "appropriate notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

10. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

11. This language should be used when the defendant is submitting an affirmative defense.

12. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

13. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Family and Medical Leave Act

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. 29 U.S.C. § 2612(a)(1)(A), (B); 29 C.F.R. § 825.112(a)(1), (2). The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends that he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Family and Medical Leave Act

5.81D FMLA - FAILURE TO REINSTATE - ELEMENTS (Employee with a Serious Health Condition)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][2] of the evidence:

[*First*, plaintiff was eligible for leave[3]; and]

First, plaintiff had a serious health condition (as defined in Instruction _____)[4]; and

Second, plaintiff was absent from work because of that serious health condition; and

Third, plaintiff received treatment and was able to return to work and perform the functions of [his/her] job at the expiration of the leave period; [5] and

Fourth, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined in Instruction _____) [6]held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction ____)][7].

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. Define the "leave period" or use the date of the expiration of the leave period.

6. Insert the number of the Instruction defining "equivalent position."

7. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co.*, 21 F. Supp. 2d 1017 (D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id.* *See infra* Model Instruction 5.84A. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Family and Medical Leave Act

5.81E FMLA - FAILURE TO REINSTATE - ELEMENTS (Employee Needed to Care for a Spouse, Son or Daughter with a Serious Health Condition[1])

Your verdict must be for the plaintiff [and against defendant _____)[2] if all of the following elements have been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

First, plaintiff's [identify family member] had a serious health condition (as defined in Instruction _____)[5];and

Second, plaintiff was needed to care for (as defined in Instruction _____)[6] [his/her] [identify family member] because of that serious health condition; and

Third, plaintiff was absent from work because [he/she] was caring for [his/her] [identify family member] with the serious health condition; and

Fourth, plaintiff was able to return to [his/her] job at the expiration of the leave period; and

Fifth, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined by Instruction _____)[7] held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][3] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)][8].

Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Model Instruction 5.81F, *infra*, should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" in section 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues

will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. Insert the number of the Instruction defining "needed to care for."

7. Insert the number of the Instruction defining "equivalent position."

8. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See infra* Model Instruction 5.84A. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005).

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Family and Medical Leave Act

5.81F FMLA - FAILURE TO REINSTATE - ELEMENTS (Employee Leave for Birth, Adoption or Foster Care)[1]

Your verdict must be for the plaintiff [and against defendant_____)[2] if all of the following elements have been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4]; and]

First, plaintiff was absent from work because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][5]; and

Second, plaintiff was able to return to [his/her] job at the expiration of the leave period; [6] and

Third, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined by Instruction _____)[7] held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][3] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)] [8].

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Model Instruction 5.81E, *supra*, should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from Instruction 5.81E, *supra*, in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the language that corresponds to the facts of the case.

6. Define the "leave period" or use the actual date of the expiration of the leave period.

7. Insert the number of the Instruction defining "equivalent position."

8. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See infra* Model Instruction 5.84A. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005)

If plaintiff is alleging defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Family and Medical Leave Act

5.82 FMLA - "SAME DECISION"

[If you find in favor of plaintiff under Instruction ____,[1] then you must answer the following question in the verdict form[s]: Has it been proved by the [(~~the~~ greater weight) ~~or (a~~ preponderance)~~)~~][2] of the evidence that defendant would have [describe employment action taken, e.g., discharge][3] plaintiff even if defendant had not considered plaintiff's [absence from work][4].][5]

Notes on Use

1. Insert the number or title of the essential elements Instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof Instruction given.

3. Select the language that corresponds to the facts of the case.

4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

5. ~~The case law is unclear whether the FMLA is to be treated like a Title VII case or like other civil rights cases. In a Title VII case, there is special statutory language that a decision for plaintiff on the issue of liability, but in favor of defendant on the "same decision" question, results in a judgment for plaintiff but no actual damages. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Plaintiff's remedies are limited to a declaratory judgment, injunction not including reinstatement or back pay and attorney fees and costs. If the FMLA is treated like other civil rights cases, defendant prevails if the judgment is in favor of defendant on the "same decision" question.~~ The Eighth Circuit has held that the FMLA does not impose strict liability for all interferences with an employee's FMLA rights; an employer will not be held liable for interference with an employee's FMLA rights if the employer can prove it would have made the same decision had the employee not exercised rights under the FMLA. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005).

Committee Comments

~~Until there is case law to the contrary, it is the Committee's position that a~~ A defendant may avoid liability in an FMLA case if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave.

Family and Medical Leave Act

5.83A FMLA - DEFINITION: "NEEDED TO CARE FOR"

An employee is "needed to care for" a spouse, son, daughter or parent with a serious health condition (as defined in Instruction _____)[1] when the family member is unable to care for his or her own basic medical, hygienic or nutritional needs or safety; or is unable to transport himself or herself to the doctor. [The phrase also includes providing psychological comfort and reassurance which would be beneficial to a family member with a serious health condition (as defined in Instruction _____)[1] who is receiving inpatient or home care. The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.[2]]

Notes on Use

1. Insert the number of the Instruction defining "serious health condition."

2. The definition of "needed to care for" is more expansive than it first appears for it includes situations in which the employee's presence or assistance would provide psychological comfort or assurance to a family member, and instances in which the employee may need to make arrangements for care. In cases in which any of these situations are applicable, this Instruction should be modified to include the additional definition(s). *See* 29 C.F.R. § 825.116(a), (b).

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.116(a)-(b).

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5.83B FMLA - DEFINITION: "SERIOUS HEALTH CONDITION"

A "serious health condition" means an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital, hospice, or residential medical care facility, or 2) continuing treatment by a health care provider (as defined in Instruction _____)[1].

Notes on Use

1. Insert the number of the Instruction defining "health care provider."

Committee Comments

This relatively brief definition is the statutory definition. 29 U.S.C. § 2611(11). A more detailed definition is supplied by the FMLA regulations and included as an alternate definition in these model instructions. 29 C.F.R. § 825.114. *See infra* Model Instruction 5.83C.

Family and Medical Leave Act

5.83C FMLA - DEFINITION: "SERIOUS HEALTH CONDITION" (alternate)

The phrase a "serious health condition" as used in these instructions means an illness, injury, impairment, or physical or mental condition that involves:

[Inpatient care (for example, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care)];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

1) Treatment two or more times by a health care provider (as defined in Instruction _____)[1], by a nurse or physician's assistant under direct supervision of a health care provider (as defined in Instruction _____)[1], or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider (as defined in Instruction _____)[1]; or

2) Treatment by a health care provider (as defined in Instruction _____)[1]on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider (as defined in Instruction _____)[1]];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic health condition, which means a condition which requires periodic visits for treatment by a health care provider (as defined in Instruction _____)[1], or by a nurse or physician's assistant under direct supervision of a health care provider (as defined in Instruction _____)[1], which continues over an extended period of time (including recurring episodes of a

single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be effective, but requires continuing supervision of a health care provider (as defined in Instruction _____)[1], even though the patient may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider (as defined in Instruction _____)[1], or by a provider of health care services under orders of, or on referral by, a health care provider (as defined in Instruction _____)[1], either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment.][1]

Notes to Use

1. Select the language that corresponds to the facts of the case. Within each optional definition, the language also may need to be adjusted on a case-by-case basis due to varying facts. For example, the court may wish to delete the language "or by a nurse or physician's assistant under direct supervision of a health care provider" if the facts of the case do not indicate that treatment was provided by someone other than the health care provider.

Committee Comments

This instruction is based on the definition of "serious health condition" as set forth in the FMLA regulations at 29 C.F.R. § 825.114. *See infra* comments in section 5.80 for further discussion of the definition of a serious health condition.

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5.83D FMLA - DEFINITION: "HEALTH CARE PROVIDER"

As used in these instructions the phrase "health care provider" includes [doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, nurse practitioner, nurse-midwife, or clinical social worker][1], so long as the provider is authorized to practice in the State and is performing within the scope of his or her practice.

Notes on Use

1. The bracketed language is not exhaustive of the types of health care workers who can meet the regulatory definition of a health care provider. For a full discussion, see the Committee Comments. Insert the appropriate language to include the type of health provider(s) relevant to the case.

Committee Comments

The FMLA defines "health care provider" as:

> (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
>
> (B) any other person determined by the Secretary [of Labor] to be capable of providing health care services.

29 C.F.R. § 825.118.

The regulations promulgated by the Department of Labor defined additional persons "capable of providing health care services" to include the workers described in the model Instruction as well as 1) chiropractors, if treatment is limited to "manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist;" 2) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; 3) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and 4) a health care provider who falls within one of the specifically mentioned categories who practices in a country other than the United States, so long as he or she is authorized to practice in accordance with the law of that country and is performing with the scope of his or her practice. The regulations state that "authorized to practice in the State" means that the health care provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider. 29 C.F.R. § 825.118.

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5.83E FMLA - DEFINITION: "APPROPRIATE NOTICE" - LEAVE FORESEEABLE [1]

The phrase "appropriate notice" as used in these instructions means that [he/she] must have notified defendant of [his/her] need for leave at least 30 days before the leave was to begin.

Notes on Use

1. This Instruction should be used in situations where plaintiff's need for leave was foreseeable.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. If the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give the employer at least 30 days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). *Nelson v. Arkansas Pediatric Facility*, 2001 WL 13291 (8th Cir. (Ark)). The adequacy of the notice in an FMLA context is a fact issue, not a question of law. *Sanders v. May Dept. Stores Co.*, 315 F.3d 940, 945 (8th Cir. 2003).

The FMLA also requires an employer to give appropriate notice. Whether an employer has satisfied its notice requirements is a jury issue. *Sanders*, 315 F.3d at 945. The employer must post a notice concerning the Act. 29 C.F.R. § 825.300(a). In addition, the employer must give written notice of an employee's rights under the Act after the employee has given appropriate notice to the employer of the need for leave. 29 C.F.R. § 825.301(c); *Sanders*, 315 F.3d at 945.

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5.83F FMLA - DEFINITION: "APPROPRIATE NOTICE" - LEAVE UNFORESEEABLE [1]

The phrase "appropriate notice" as used in these instructions means that [he/she] must have notified defendant of [his/her] need for leave as soon as practicable after [he/she] learned of the need to take leave.

Notes on Use

1. This Instruction should be used in situations where plaintiff's need for leave was unforeseeable.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. In the case of unexpected absences where 30 days advance notice is not possible, the regulations require the employee to give the employee notice "as soon as practicable." 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). The regulations further state that ordinarily "as soon as practicable" requires the employee to give at least verbal notification within one or two business days after the employee learns of the need for leave. 29 C.F.R. § 825.302(b). *See also Browning v. Liberty Mutual Insurance Company*, 178 F.3d 1043, 1049 (8th Cir. 1999); *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). *Nelson v. Arkansas Pediatric Facility*, 2001 WL 13291 (8th Cir. (Ark)). The adequacy of the notice in an FMLA context is a fact issue, not a question of law. *Sanders v. May Dept. Stores Co.*, 315 F.3d 940, 945 (8th Cir. 2003).

The FMLA also requires an employer to give appropriate notice. Whether an employer has satisfied its notice requirements is a jury issue. *Sanders*, 315 F.3d at 945. The employer must post a notice concerning the Act. 29 C.F.R. § 825.300(a). In addition, the employer must give written notice of an employee's rights under the Act after the employee has given appropriate notice to the employer of the need for leave. 29 C.F.R. § 825.301(c); *Sanders*, 315 F.3d at 945.

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5.83G FMLA - DEFINITION: "EQUIVALENT POSITION"

An "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

Committee Comments

This definition is taken from the FMLA regulations at 29 C.F.R. § 825.215(a). This is somewhat different than the approach taken by the ADA. An ADA plaintiff must demonstrate that he or she is unable to work in a broad range of jobs to show that he or she is unable to perform the major life activity of working and is, therefore, disabled for purposes of the ADA; a plaintiff who shows only an inability to perform his or her own job has not, therefore, made a showing of disability sufficient to entitle him or her to the protections of the ADA. 29 C.F.R. § 1630.2(j)(3)(i). However, a demonstration that an employee is unable to work in his or her job due to a serious health condition is enough to show the employee is incapacitated for purposes of the FMLA. 29 C.F.R. § 825.702(b); *Steckloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 861 (8th Cir. 2000).

Family and Medical Leave Act

5.84 FMLA - EXCEPTION TO JOB RESTORATION (Key Employee)

Your verdict must be for the defendant if it has been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][1] of the evidence that plaintiff was a key employee and that denying job restoration to plaintiff was necessary to prevent substantial and grievous economic injury to the operations of the employer. In considering whether or not plaintiff was a key employee you may consider factors such as whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee.

Notes on Use

1. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

Committee Comments

An employer may deny job restoration to a "key employee" if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 825.216(c). In determining what constitutes a substantial and grievous economic injury, the focus should be on the extent of the injury to the employer's operations, not whether the absence of the employee will cause the injury. 29 C.F.R. § 825.218(a). This standard is different and more stringent than the "undue hardship" test under the Americans with Disabilities Act. 29 C.F.R. § 825.218(d). While a precise definition is not provided in the regulations, factors to consider in making that determination are provided at 29 C.F.R. § 825.218(b). They include whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee. *Id.*

The court may wish to define "key employee," which is defined by FMLA regulation as a salaried employee who is eligible to take FMLA leave and who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employer's worksite. 29 C.F.R. § 825.217(a). The method of determining whether the employee is "among the highest paid 10 percent" is described in the FMLA regulations. 29 C.F.R. § 825.217(c). No more than 10 percent of the employer's employees within 75 miles of the worksite may be "key employees." 29 C.F.R. § 825.217(c)(2). The term "salaried" has the same meaning under the FMLA as it does under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, as amended. 29 C.F.R. § 825.217(b), 29 C.F.R. § 541.118.

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5.84A FMLA - EXCEPTION TO JOB RESTORATION
(Employee would not have been Employed at Time of Reinstatement)

Your verdict must be for the defendant if it has been proved by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][1] of the evidence that plaintiff would not have been employed by the defendant at the time job reinstatement was requested.

Notes on Use

1. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

Committee Comments

An employer is not required to provide an employee returning from medical leave "any right, benefit or position of employment other than the right, benefit or position to which the employee would have been entitled had the employee never taken leave." 29 U.S.C. § 2614(a)(3)(B); *Marks v. The School Dist. of Kansas City, Mo.*, 941 F. Supp. 886, 892 (W.D. Mo. 1996). Thus, an employee is not entitled to job reinstatement after FMLA leave if the employer can show that the employee would not otherwise have been employed at the time reinstatement is requested. 29 C.F.R. § 825.216(a). For example, an employer is not required to reinstate an employee who was laid off during the course of taking FMLA leave. 29 C.F.R. § 825.216(a)(1).

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5.85 FMLA - ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction ____[1] then you must award plaintiff the amount of any wages, salary, and employment benefits plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge] through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages – that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by the [(greater weight) (preponderance)][2] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [his/her], you must reduce [his/her] damaged by the amount [he/she] reasonably could have avoided if [he/she] had sought out or taken advantage of such an opportunity.][3]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][4]

Notes on Use

1. Insert the number or title of the essential elements instruction here.

2. The bracketed language should be inserted which corresponds to the burden-of- proof Instruction given.

3. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002); *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

4. This paragraph may be given at the trial court's discretion.

Committee Comments

The FMLA provides that a prevailing plaintiff is entitled to recover actual damages and interest thereon plus an additional equal amount as liquidated damages. 29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.400(c); *Morris v. VCW, Inc.*, 1996 WL 740544 (W.D. Mo. 1996). In *Morris*, the court held that an employee could not recover interest because she failed to present evidence at trial regarding the method of calculating the amount of interest. *Id.* at *16.

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Where a prevailing plaintiff has not lost wages, salary or employment benefits, he or she may be entitled to other compensation. 29 U.S.C. § 2617, 29 C.F.R. § 825.400(c). For example, an employee who was denied FMLA leave may be able to recover any monetary losses incurred as a direct result of the FMLA violation, such as the cost of providing for a family member, up to an amount equal to 12 weeks of wages or salary for the employee. 29 U.S.C. § 2617(a)(1).

In the Eighth Circuit, damages for emotional distress ~~have been approved. *See Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 496 (8th Cir. 2002) (approving compensatory damages for mental distress) (citing *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190 (8th Cir. 2000) (approving mental distress damages under Iowa Public Policy)). *But see Koch v. St. Francis Med. Center*, 2002 WL 32063336 (E.D. Mo.) (stating it is not clear whether *Duty* awarded damages for mental distress under Arkansas Civil Rights Act or the FMLA); *Keene v. Rinaldi*, 127 F. Supp. 2d 770 (M.D.N.C. 2000).~~ are not permitted. *Rodgers v. City of Des Moines*, 2006 WL 167899 (S.D. Ia. 2006) (holding damages recoverable under the FMLA are strictly defined in the statute and measured by actual monetary losses).

Family and Medical Leave Act

5.86 FMLA - GOOD FAITH DEFENSE TO LIQUIDATED DAMAGES

If you find in favor of plaintiff under Instruction _____[1], then you must decide whether defendant acted in good faith. You must find defendant acted in good faith if you find by the [(~~the~~ greater weight) ~~or~~ (~~a~~ preponderance)][2] of the evidence that when defendant [insert defendant's act or omission], defendant reasonably believed that its actions complied with the Family and Medical Leave Act.

Notes on Use

1. Insert the number or title of the essential elements Instruction here.

2. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

Committee Comments

A prevailing plaintiff in an FMLA case is entitled to liquidated damages in an amount equal to actual damages plus interest. 29.U.S.C. § 2617(a)(1); 29 C.F.R. § 825.401(c); *Morris v. VCW, Inc.*, 1996 WL 740544 (W.D. Mo. 1996). In *Morris*, the United States District Court for the Western District of Missouri looked to case law under the Fair Labor Standards Act to determine whether plaintiff was entitled to liquidated damages. *Id.* at *2 (the statutory relief provided by the FMLA's liquidated damage provision "parallels the provisions of the FLSA." S. Rep. No. 103-3 at 35; *compare* 29 U.S.C. § 216(b) *with* 29 U.S.C. § 2617(a)(1)).

The language for this Instruction is based on the court's analysis of the good-faith defense in *Morris*, 1996 WL 740544, at *3. The FMLA allows an employer to avoid the imposition of liquidated damages if it can show that its act or omission was made in good faith and that it had reasonable grounds for believing it was acting in accordance with the FMLA. 29 U.S.C. § 2617(a)(1)(A)(iii). *Morris* describes it as "subjective good faith" and an "objective reasonable belief" its conduct did not violate the law. *Id.* at *3. Good faith requires some duty on the part of the employer to investigate potential liability under the FMLA. *Morris*, 1996 WL 740544, at *3.

Family and Medical Leave Act

5.87 FMLA - VERDICT FORM

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [violation of the FMLA] [1] claim of plaintiff [John Doe], [as submitted in Instruction _____] [2], we find in favor of:

_____

(Plaintiff John Doe) or (Defendant XYZ, Inc.)

Note: Answer the next question only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved by the [(greater weight) (preponderance)] [3] of the evidence that defendant would have (describe employment action taken, e.g., discharged) [4] plaintiff regardless of [his/her] (exercise of [his/her] rights under the FMLA)? [5]

_____ Yes _____ No

(Mark an "X" in the appropriate space.)

Note: Complete the following paragraph only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find plaintiff's damages [, other than for emotional distress] [6] to be:

$_____ (stating the amount or, if none, write the word ("none").

[We find plaintiff's damages for emotional distress to be:

$_____ (stating the amount, if none, write the word ("none").

_____

Foreperson

Dated: _____

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Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction may be inserted here. *See supra* Model Instructions 5.81 A-F.

3. Select the bracketed language that corresponds to the burden-of-proof instruction given.

4. Select the language that corresponds to the facts of the case.

5. This question submits the "same decision" issue to the jury. *See supra* Model Instruction 5.82.

6. As noted *supra* in the Committee Comments to Model Instruction 5.85, the issue of whether damages for emotional distress will be allowed under the FMLA is not completely resolved. The bracketed language may be used if there is evidence of emotional distress. These damages are segregated from plaintiff's other damages in the verdict form in order to avoid the need for retrial if the issue is resolved in the negative. *See Nevada Dep't of Human Resources v. Hibbs*, 583 U.S. 721, 738 (2003), describing the many limitations placed on the scope of the FMLA by Congress.

7. FEDERAL EMPLOYERS' LIABILITY ACT
Introduction

The Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, commonly referred to as the "F.E.L.A.," makes railroads engaging in interstate commerce liable in damages to their employees for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51 (1939).

Although grounded in negligence, the statute does not define negligence; federal case law does so. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Generally, to prevail on an F.E.L.A. claim, a plaintiff must prove the traditional common law components of negligence including duty, breach, foreseeability, causation and injury. *Adams v. CSX Transp. Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987). This includes whether the defendant railroad failed to use reasonable or ordinary care under the circumstances. *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir.), *cert. denied*, 429 U.S. 1002 (1976); *McGivern v. Northern Pacific Ry. Co.*, 132 F.2d 213, 217 (8th Cir. 1942). Typically, it must be shown that the railroad either knew or should have known of the condition or circumstances that allegedly caused plaintiff's injury. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir.), *cert. denied*, 360 U.S. 917 (1959). Ordinarily, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury, *Davis*, 541 F.2d at 185, although the exact manner in which the injury occurs and the extent of the injury need not be foreseen, *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 120 (1963).

Although grounded in negligence, the F.E.L.A. is "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958). The Act's most distinctive departure from the common law is in the area of causation. The plain language of 45 U.S.C. § 51 (1939) establishes a standard of "in whole or in part" causation which replaces the common law standard of proximate causation. "[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury." *Nicholson v. Erie R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958). "The F.E.L.A. has its own rule of causation." *Id.* "The test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury which is the subject of the suit." *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902, 909 (8th Cir.), *cert. denied*, 449 U.S. 1110 (1980). The quantum of proof necessary to submit the question of negligence to the jury and the quantum of proof necessary to sustain a jury finding of negligence are also modified under the F.E.L.A.

> It is well established that, under FELA, a case must go to the jury if there is any probative evidence to support a finding of even the slightest negligence on the part of the employer, *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506-07 (1957), and that jury verdicts in favor of plaintiffs can be sustained upon evidence that would not support such a verdict in ordinary tort actions, *Heater v.*

Chesapeake & Ohio Railway, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974).

Caillouette v. Baltimore & Ohio Chicago Terminal R. Co., 705 F.2d 243, 246 (7th Cir. 1983).

As the F.E.L.A. has modified the common law negligence case, it has also "stripped" certain defenses from the F.E.L.A. cause of action. *See Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 507-08 (1957). Contributory negligence is no bar to recovery. It may only be used to proportionately reduce the plaintiff's damages. 45 U.S.C. § 53. If the negligence of plaintiff employee is the sole cause of his own injury or death, there is no liability because the railroad did not cause or contribute to cause the employee's injury or death. *New York Cent. R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R. Co.*, 738 F.2d 328, 331 (8th Cir. 1984); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 883 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 827 (5th Cir. 1965). Although assumption of risk is abolished as a defense altogether, 45 U.S.C. § 54, evidence supporting the defense of contributory negligence should not be excluded merely because it also would support an assumption of the risk argument. *Beanland v. Chicago, Rock Island and Pac. R. Co.*, 480 F.2d 109, 116 n.5 (8th Cir. 1973).

Despite the foregoing authorities and F.E.L.A. principles, it must be kept in mind that the provisions of 45 U.S.C. § 51 which establish a negligence cause of action do not establish an absolute liability cause of action. "[T]he Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees." *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949). "That proposition is correct, since the Act imposes liability only for negligent injuries." *Id.*; *cf. Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635, 638 (8th Cir. 1948). The plaintiff has the burden to prove the elements of the F.E.L.A. cause of action, including the railroad's failure to exercise ordinary care, notice, reasonable foreseeability of harm, causation and damages.

In addition to the negligence cause of action of 45 U.S.C. § 51, the F.E.L.A. also provides for certain causes of action which are not based upon negligence. These are actions brought under the F.E.L.A. for injury caused by the railroad's violation of the Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified as 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994)), or the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified as 49 U.S.C. §§ 20102, 20701 (1994)).

Sometimes the same factual circumstances will give rise to a claim under the general negligence provision of the F.E.L.A., as well as a claim under the Safety Appliance Act or a claim under the Boiler Inspection Act. While the same facts may give rise to a combination of these three types of F.E.L.A. claims, the elements of an F.E.L.A. general negligence claim are separate and distinct from those of an F.E.L.A. Safety Appliance Act or F.E.L.A. Boiler Inspection Act claim.

The Safety Appliance Act and Boiler Inspection Act require that certain railroad equipment be kept in certain prescribed conditions. If the equipment is not kept in the prescribed

conditions and an employee is thereby injured, the employee may bring a cause of action under 45 U.S.C. § 51. In such a case, proof of the violation of the Safety Appliance Act or Boiler Inspection Act supplies "the wrongful act necessary to ground liability under the F.E.L.A." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949). The Safety Appliance Act and Boiler Inspection Act thus "dispense, for the purposes of employees' suits with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." *Urie*, 337 U.S. at 189. The United States Supreme Court "early swept all issues of negligence out of cases under the Safety Appliance Act." *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949).

In other words, in F.E.L.A. cases brought for injury caused by violation of the Boiler Inspection Act or Safety Appliance Act, care on the part of the railroad is immaterial. "The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous." *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 15 (1938). Likewise, in such cases, care on the part of the employee is immaterial insofar as the defense of contributory negligence is not available to bar the plaintiff's action or to reduce the damages award. 45 U.S.C. § 53, However, if the plaintiff's negligence was the sole cause of the injury or death, then the statutory violation could not have contributed in whole or in part to the injury or death. *Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir.), *cert. denied*, 467 U.S. 1216 (1984).

Despite the elemental differences between these types of cases "(t)he appliance cause often is joined with one for negligence, and even sometimes . . . mingled in a single mongrel cause of action." *O'Donnell*, 338 U.S. at 391. In order to avoid such mingling, claims brought under the general F.E.L.A. negligence provisions of the Act, claims brought under the Safety Appliance Act and claims brought under the Boiler Inspection Act should all be submitted by separate elements instructions. *See infra* Model Instructions 7.01 (elements instruction for claims brought under the general F.E.L.A. negligence provisions of the Act); Model Instruction 7.04 (elements instruction for claims brought under Boiler Inspection Act); Model Instruction 7.05 (elements instruction for claims brought under the Safety Appliance Act).

For a more thorough overview of the F.E.L.A. *see* Richter and Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13 (1951) or Michael Beethe, *Railroads Swing Injured Employees: Should the Federal Employers' Liability Act Allow Railroads to Recover from Injured Railroad Workers for Property Damages?*, 65 U.M.K.C. L. Rev. 231 (1996)

Finally, a motivating purpose for Congress in enacting the F.E.L.A. was to simplify the common law negligence action which had previously provided the injured railroad worker's remedy.

> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant . . . . [F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.

Rogers, 352 U.S. at 507-8 (footnotes omitted).

Given this purpose of the F.E.L.A. and the nature of the F.E.L.A. cause of action, the instructions in this section are drafted in the same format as are the other instructions in this manual generally. They are drafted to present the jury only those issues material to the questions it is to decide. Toward this goal, abstract statements of law and evidentiary detail are avoided.

A number of jurisdictions submit F.E.L.A. cases by instruction schemes which present propositions of law and paraphrase the underlying statutes. Notable among the jurisdictions which instruct in this manner are Illinois and Arkansas. Although the Committee has adopted the ultimate issue instruction format for this manual in general and the F.E.L.A. instructions in specific, the Committee recognizes that other instruction schemes are equally valuable. None of the instructions in this manual are mandatory, and any court which prefers to use another appropriate instruction set or system should do so.

Federal Employers' Liability Act

7.01 GENERAL F.E.L.A. NEGLIGENCE

Your verdict must be for plaintiff [and against defendant (name of defendant)][1] [on plaintiff's (identify claim presented in this elements instruction as "*first*," "*second*," etc.) claim][2] if all of the following elements have been proved by [the greater weight of the evidence] [a preponderance of the evidence][3]:

First, [(plaintiff) or ~~[~~(name of decedent)] was an employee of defendant [(name of defendant)], and[4, 5]

Second, defendant [(name of defendant)] failed to provide:[6]

(reasonably safe conditions for work [in that (describe the conditions at issue)] or)

(reasonably safe tools and equipment [in that (describe the tools and equipment at issue)] or)

(reasonably safe methods of work [in that (describe the methods at issue)] or)

(reasonably adequate help [in that (describe the inadequacy at issue)]), and

Third, defendant [(name of defendant)] in any one or more of the ways described in Paragraph *Second* was negligent,[7] and[8]

Fourth, such negligence resulted in whole or in part[9] in [injury to plaintiff] [the death of (name of decedent)].

If any of the above elements has not been proved by [the greater weight of the evidence] [a preponderance of the evidence], then your verdict must be for defendant [(name of defendant)].[10]

[Your verdict must be for defendant if you find in favor of defendant under Instruction ____ (insert number or title of affirmative defense instruction)].[11]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim covered by this elements instruction is made.

2. Include this phrase and identify the claim covered by this elements instruction as "*first*," "*second*," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04, *infra*.

4. The F.E.L.A. provides that the railroad "shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . ." 45 U.S.C. § 51 (1939) (emphasis added). In the typical F.E.L.A. case, there is no dispute as to whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term "employee" must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that RESTATEMENT (SECOND) OF AGENCY (1958) be used as a guideline in a manner consistent with the federal authorities. *See Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) (discussion of Restatement (Second) of Agency (1957) as authoritative concerning meaning of "employee" and "employed" under the F.E.L.A. and as source of proper jury instruction).

Sometimes employees of one company work on property or equipment owned by a railroad. In such situations, the individual can be said to be employed by the railroad if the railroad controlled or had the right to control the plaintiff's work. The passing of information and other coordinated efforts between employees of the two companies are not alone enough to satisfy this test. To find that the plaintiff was employed by the railroad, the railroad's employees must have had a supervisory role over the plaintiff's work. *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 198-99, 200-02 (8th Cir. 1981), *cert. denied*, 456 U.S. 1000 (1982).

5. It may be argued the plaintiff was not acting within the scope of his or her railroad employment at the time of the incident. If there is a question whether the employee was within the scope of employment, paragraph *First* should provide as follows:

> *First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of defendant)] acting within the scope of (his) (her) employment at the time of (his) (her) [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term "scope of employment" must be defined in relation to the factual issue in the case. The RESTATEMENT (SECOND) OF AGENCY (1958) is recognized as a guide. *Wilson v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 841 F.2d 1347, 1352 (7th Cir.), *cert. dism.*, 487 U.S. 1244 (1988). In rare cases it may be argued that the duties of the employee did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of his employment for the railroad his conduct will be sufficiently connected to interstate commerce to be included within the Act.

6. This paragraph of the elements instruction is designed to present descriptions of the conduct alleged to constitute breach of the railroad's standard of care in the majority of F.E.L.A.

cases. These descriptions should focus the jurors' attention upon the evidence without belaboring the elements instruction with evidentiary detail. The description may consist of no more than the appropriate phrase or phrases "reasonably safe conditions for work," "reasonably safe tools and equipment," "reasonably safe methods of work" or "reasonably adequate help." *However, if a more specific description will be helpful to the jury and is deemed by the court to be desirable in the particular case, a more specific description should be used.* The following are examples of ways in which the applicable phrase may be modified to provide further description:

First, defendant either failed to provide:

reasonably safe conditions for work in that there was oil on the walkway, or

reasonably safe tools and equipment in that it provided plaintiff with a lining bar that had a broken claw, or

reasonably safe methods of work in that it failed to require plaintiff to wear safety goggles while welding rail, or

reasonably adequate help in that it required plaintiff to lift by himself a track saw that was too heavy to be lifted by one worker, and

7. The terms "negligent" and "negligence" must be defined. *See infra* Model Instructions 7.09, 7.10 and 7.11.

8. If only one phrase describing the railroad's alleged breach of duty is submitted in Paragraph *Second*, then Paragraph *Third* should read as follows:

Third, defendant [(name of defendant)] was thereby negligent, and

9. The standard of causation in an F.E.L.A. case is whether the injury or death was caused "in whole or in part" by the railroad's negligence. 45 U.S.C. § 51; *see infra* Introduction to Section 7. No other causation language is necessary.

The defendant may request an instruction stating that if plaintiff's negligence was the sole cause of his injury, he may not recover under the F.E.L.A. *New York Central R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R.R. Co.*, 738 F.2d 328, 330-31 (8th Cir. 1984) (not error to instruct jury, "if you find that the plaintiff was guilty of negligence, and that the plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of defendant"). Such a defense may also arise under the Boiler Inspection and Safety Appliance Acts. *See Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir.), *cert. denied*, 467 U.S. 1216 1984).

Sole cause instructions have sometimes been criticized as unnecessary and as confusing. *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 883-84 n.1 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1097

(5th Cir. 1970); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965). The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case. If the court decides to give a sole cause type instruction, the following may be appropriate:

> The phrase "in whole or in part" as used in [this instruction] [Instruction _____ (state the title or number of the plaintiff's elements instruction)] means that the railroad is responsible if its negligence, if any, played any part, no matter how small, in causing the plaintiff's injuries. This, of course, means that the railroad is not responsible if any other cause, including plaintiff's own negligence, was solely responsible.*

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 507 (1957); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965).

As is the case with any model instruction, if the court determines that some other instruction on the subject is appropriate, such an instruction may be given.

10. This paragraph should not be used if Model Instruction 7.02A or 7.02B is given.

11. Use Model Instruction 7.02C, *infra*, to submit affirmative defenses.

*This instruction may be given as a paragraph in the plaintiff's elements instruction or as a separate instruction.

7.02B FAILURE TO PROVE ANY FACT ESSENTIAL TO PLAINTIFF'S RIGHT TO RECOVER

Your verdict must be for defendant [(name of defendant)][1] [on plaintiff's (identify claim as "*first*," "*second*," etc.) claim][2] unless it has been proved by [the greater weight of the evidence] [a preponderance of the evidence][3] that [(specify any fact which plaintiff must prove in order to recover)].[4]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim identified in this instruction is made.

2. Include this phrase and identify the claim represented in this instruction as "*first*," "*second*," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04, *infra*.

4. Of course, it is an issue of substantive law as to what facts are essential to plaintiff's right to recover. See the examples in the Committee Comments above for instructions on the defense theories of failure to prove notice and failure to prove reasonable foreseeability of harm.

Committee Comments

See Introduction and Committee Comments to the 7.02 series of defense theory instructions for a discussion of the general principles underlying their use. If the defendant wants 7.02A and 7.02B instructions to be given in a case, they should be combined in a single defense theory instruction following the 7.02B format.

This defense theory instruction format is similar to the 7.02A format, but differs in that the defendant is not restricted to a repetition of the exact language used in the elements instruction. The 7.02B format is intended by the Committee to address the kind of instruction issues discussed in *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947) and *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954). *See* Introduction and Committee Comments to 7.02 series of defense theory instructions.

The Committee anticipates that the 7.02B format can be used, for example, to instruct on plaintiff's burden to prove "notice" and "reasonable foreseeability of harm." For a discussion of these concepts, *see infra* Committee Comments, Model Instruction 7.09.

The close and interdependent relationship of notice and reasonable foreseeability of harm to the ultimate question of whether the railroad exercised due care raises the issue whether the jury should be instructed to make separate findings of notice and reasonable foreseeability of

harm in the elements instruction. In *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525, 527-28 (5th Cir. 1951), and *Patterson v. Norfolk & Western Railway Company*, 489 F.2d 303, 305 (6th Cir. 1973), instructions calling for such separate findings were found improper in that they misrepresented the ultimate question of reasonable or ordinary care. However, in *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954), it was held error to refuse defendant's notice and reasonable foreseeability of harm instructions which "more specifically" than the court's instructions presented defendant's theory of defense. Similarly, in *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947), it was error to refuse to give an instruction requested by defendant on defendant's defense theory that plaintiff had failed to prove notice. Other cases of interest are: *Denniston v. Burlington Northern, Inc.*, 726 F.2d 391, 393-94 (8th Cir. 1984) (no plain error in instructing that the plaintiff was required to prove notice); and *Baynum v. Chesapeake & Ohio Railway Co.*, 456 F.2d 658, 660 (6th Cir. 1972) (verdict for plaintiff upon sufficient evidence of notice rendered refusal of notice instruction harmless error).

By way of illustration, assume that plaintiff's submission of negligence is that defendant failed to provide reasonably safe conditions for work in that there was oil on the walkway (*see infra* Model Instruction 7.01 n.8). Assume further that defendant's theory of defense is that defendant did not know and could not have known in the exercise of ordinary care that there was oil on the walkway. The defense theory instruction for this defense might read as follows: "Your verdict must be for defendant unless it has been proved by the greater weight of the evidence that defendant knew or by the exercise of ordinary care should have known that there was oil on the walkway." In other words, a notice defense theory instruction should specify the defect, condition or other circumstance so it will be clear what fact or facts must be proved in order to establish notice.

Where defendant claims it is not negligent because it did not have a reasonable opportunity to remove or repair a defect, such as a spill, the jury may be instructed as follows: "Your verdict must be for defendant unless it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant had a reasonable opportunity to [clean up the spill] before plaintiff was injured."

As an example of a defense theory instruction on reasonable foreseeability of harm, assume a case where plaintiff is claiming occupational lung disease caused by exposure to diesel fumes. The negligence submission from the elements instruction might read: "Defendant failed to provide reasonably safe conditions for work in that plaintiff was repeatedly exposed to diesel fumes." The defense theory instruction on foreseeability of harm might read as follows: "Your verdict must be for defendant unless it has been proved by the greater weight of the evidence that defendant knew or by the exercise of ordinary care should have known that repeated exposure to diesel fumes was reasonably likely to cause harm to plaintiff."

While notice and foreseeability of harm are common defense theories that can be accommodated by the 7.02B format, this format is not limited to those particular theories. This format can be used to specify any fact upon which the plaintiff bears the burden of proof and

which fact is essential to plaintiff's right to recover. Of course, it is up to the court to determine what those "essential facts" might be under the case law and under the circumstances of the particular case before the court.

The 7.02B format should not be used to specify a fact upon which the defendant bears the burden of proof. If the defendant bears the burden of proof to establish the defense theory, the 7.02C format should be followed.